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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 OHIO SECURITY INSURANCE  
COMPANY,

11 Plaintiff,

12 v.

13 PUGET SOUND ENERGY, INC. and  
14 PILCHUCK CONTRACTORS, INC.,

15 Defendants.  
16

CASE NO. C18-987-MJP

ORDER DENYING MOTION FOR  
REMAND

17 THIS MATTER comes before the Court on Plaintiff Ohio Security Insurance Company's  
18 Motion for Remand. (Dkt. No. 7.) Having reviewed the Motion, the Response (Dkt. No. 11),  
19 the Reply (Dkt. No. 19) and the related record, and having reviewed the parties Joint Response to  
20 its Order to Show Cause (Dkt. No. 26), the Court DENIES the Motion.

21 **Background**

22 This case arises out of a natural gas explosion that occurred in Seattle, Washington in  
23 March, 2016. (Dkt. No. 1, Ex. 1 at ¶ 1.1.) The explosion destroyed several properties in the  
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1 surrounding neighborhood, including a commercial building leased by the Gillies & Oil Family  
2 Cyclery, LLC (“G&O”) and insured by Plaintiff Ohio Security Insurance Company (“Ohio  
3 Security”). (Id. at ¶¶ 3.1, 3.4.) On July 14, 2017, G&O filed suit against Defendants Puget  
4 Sound Energy (“PSE”) and Pilchuck Contractors, Inc. (“Pilchuck”) in King County Superior  
5 Court for damages resulting from the explosion. (Dkt. No. 2, Ex. 2 at 2-10.)

6 On May 2, 2018, G&O entered into a Settlement Agreement with PSE and Pilchuck.  
7 (See Dkt. No. 12.) The Settlement Agreement provided that G&O would recover only its  
8 uninsured damages (i.e., those for which it was not “compensated by insurance payments”) and  
9 would not seek recovery of “amounts paid pursuant to insurance for which their insurance  
10 company (Ohio Security Insurance Company and/or any other affiliated companies, including  
11 Liberty Mutual Insurance) alleges a right of subrogation.” (Id. at ¶ 1.) Through the Settlement  
12 Agreement, G&O “forever release[d]” PSE and Pilchuck “from all claims, rights, duties, causes  
13 of action, suits, demands, matters, and issues of every nature and description, known or  
14 unknown, including future claims, lawsuits, injuries, and expenses, that arise out of or relate in  
15 any way” to the lawsuit or the underlying explosion. (Id. at ¶ 5.) The Settlement Agreement  
16 provided that Ohio Security would be allowed to pursue its own claim for the insured losses:

17 Ohio Security Insurance Company and/or any affiliated companies, including  
18 Liberty Mutual Insurance (collectively “Ohio Security”) alleges it has subrogation  
19 claims with respect to payments made to Plaintiffs under applicable insurance  
20 policies. Ohio Security is not a party to the Lawsuit and its alleged subrogation  
21 claims are not part of the Lawsuit. Nothing in this Agreement or the dismissal of  
22 the Lawsuit is intended, or should be interpreted, to prejudice Ohio Security’s  
23 alleged subrogation rights with respect to insurance payments made to Plaintiffs  
24 and PSE otherwise reserves all defenses to Ohio Security’s claims.

(Id. at ¶ 6.)

On May 15, 2018, Ohio Security moved for a TRO to prevent dismissal of the case  
without its consent. (See Dkt. No. 2, Ex. 4 at 42-47.) Ohio Security argued that “G&O Cyclery

1 is the only real party in interest in this lawsuit,” such that “if Ohio Security is forced to refile this  
2 lawsuit in order to only pursue its subrogation claim . . . it nevertheless is compelled to do so in  
3 the name of G&O Cyclery, not Ohio Security.” (*Id.* at 45.)

4 On May 18, 2018, Ohio Security, G&O, PSE, and Pilchuck entered into a Stipulation for  
5 Miscellaneous Relief (the “Stipulation”) which provided that “[t]o avoid the need for the parties  
6 and the Court to dismiss the entire case, and require Ohio Security to file a new lawsuit,” G&O  
7 would be permitted to dismiss their claims with respect to *uninsured* losses with prejudice, and  
8 following dismissal, the case caption would be amended to substitute Ohio Security for G&O  
9 with respect to *insured* losses. (Dkt. No. 2, Ex. 5 at 2-6.) As part of the Stipulation, Ohio  
10 Security agreed to withdraw its motion for TRO. (*Id.* at 3.) The Superior Court approved the  
11 Stipulation and entered an order (1) dismissing G&O’s “claims for uninsured losses” with  
12 prejudice; (2) dismissing G&O from the litigation; (3) amending the case caption to remove  
13 G&O and add Ohio Security as a named plaintiff; and (4) instructing Ohio Security to file an  
14 amended complaint “to recover alleged *insured* losses” (the “Court Order”). (*Id.* at 9.)

15 On June 22, 2018, Ohio Security filed its Amended Complaint against PSE and Pilchuck  
16 seeking recovery of the amount of the insured losses it paid to G&O. (*See* Dkt. No. 1, Ex. 1.)

17 On July 3, 2018, PSE removed the case to federal court based on diversity of citizenship  
18 under 28 U.S.C. § 1332.<sup>1</sup> (*See* Dkt. No. 1.) Ohio Security now moves for remand. (Dkt. No. 7.)  
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21 <sup>1</sup> The Court notes that removal was timely. In general, a notice of removal must be filed  
22 within 30 days after the receipt by the defendant of the initial pleading. 28 U.S.C. § 1446(a).  
23 However, “if the case stated by the initial pleading is not removable, a notice of removal may be  
24 filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of  
an *amended pleading*, motion, order or other paper from which it may first be ascertained that  
the case is one which is or has become removable.” 28 U.S.C. § 1446(b)(3)(emphasis added).

## Discussion

Under 28 U.S.C. § 1332(a), the federal district court has original jurisdiction in all civil actions where the amount in controversy exceeds \$75,000 and there is complete diversity of citizenship between the parties. The parties do not dispute that the amount in controversy exceeds \$75,000, but dispute whether the requirement for diversity of citizenship is satisfied. The Court concludes that it is.

### I. Diversity of Citizenship

For purposes of establishing diversity jurisdiction, “a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business . . .” 28 U.S.C. § 1332(c)(1). Ohio Security is a New Hampshire corporation with its principal place of business in New Hampshire. (Dkt. No. 1, Ex. 1 at ¶¶ 2.1-2.3.) PSE, Pilchuck, and G&O are Washington corporations with their principal places of business in Washington. (*Id.* at ¶¶ 2.1-2.3; Dkt. No. 2, Ex. 2 at 3.) Only Ohio Security, PSE, and Pilchuck are named in the Amended Complaint, such that each plaintiff is diverse from each defendant. (*See* Dkt. No. 1.)

### A. Forum Defendant Rule

In general, § 1332 “confines removal on the basis of diversity jurisdiction to instances *where no defendant is a citizen of the forum state.*” *Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 939 (9th Cir. 2006) (emphasis added); *see also* 28 U.S.C. § 1441(b)(2) (“A civil action otherwise removable solely on the basis of [diversity] jurisdiction . . . may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.”). This is because “[t]he purpose of diversity jurisdiction is to provide a federal forum for out-of-state litigants where they are free from prejudice in favor of a

1 local litigant.’ The need for such protection is absent, however, in cases where the defendant is a  
2 citizen of the state in which the case is brought.” Lively, 456 F.3d at 940 (quoting Tosco Corp.  
3 v. Cmtys. For a Better Env’t, 236 F.3d 495, 502 (9th Cir. 2001)).

4 While the forum defendant rule would generally preclude PSE and Pilchuck—both  
5 Washington corporations—from removing a case filed in Washington state court for diversity  
6 jurisdiction, Ohio Security failed to timely raise this procedural objection in its motion for  
7 remand. See 28 U.S.C. § 1447(c) (“A motion to remand the case on the basis of any defect other  
8 than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice  
9 of removal under section 1446(a)”); see also N. Cal. Council of Laborers v. Pittsburg-Des  
10 Moines Steel Co., 69 F.3d 1034, 1037-38 (9th Cir. 1995) (holding that a procedural defect must  
11 be raised within 30 days of the date of removal, and that “the district court [has] no authority to  
12 remand the case to the state court on the basis of a defect in removal procedure raised for the first  
13 time more than 30 days after the filing of the notice of removal.”). Accordingly, Ohio Security  
14 waived the protection of the forum defendant rule, which does not preclude removal in this case.

## 15 **II. Real Party In Interest**

16 While conceding that G&O’s claims have been dismissed with prejudice and that G&O is  
17 not presently a party and cannot be substituted as a party, Ohio Security nevertheless contends  
18 that there is not complete diversity of citizenship because G&O “is the real party in interest . . .”  
19 (Dkt. No. 7 at 3.) In support of its position, Ohio Security relies upon Allstate Ins. Co. v.  
20 Hughes, 358 F.3d 1089 (9th Cir. 2004). In Hughes, the Ninth Circuit held that the insured, not  
21 the insurer, was the real party in interest, such that the insurer could not bring its subrogation  
22 claim in federal court under Federal Rule of Civil Procedure 17(a). Id. at 1095. Because  
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1 inclusion of the insured would have destroyed diversity of citizenship, the Ninth Circuit  
2 remanded and instructed the district court to dismiss for lack of jurisdiction. Id.

3 The Court finds that the situation here is distinguishable from Hughes. Here, Ohio  
4 Security is the real party in interest, not by virtue of any subrogation claim, but rather by virtue  
5 of the fact that G&O assigned to Ohio Security the entire cause of action through the Stipulation  
6 and Court Order.

7 There is a “real, if subtle, distinction between subrogation and assignment.” Absher  
8 Const. Co. v. North Pacific Ins. Co., No. 10-5821JLR, 2012 WL 13707, at \*5 (W.D. Wash. Jan.  
9 3, 2012). “Subrogation presupposes actual payment and satisfaction of a debt or claim to which  
10 the payor is subrogated, whereas under an assignment of a right or claim, the whole right or  
11 claim is assigned. In essence, while subrogation is a designation of proceeds recovered from a  
12 wrongdoer, an assignment transfers the entire cause of action to the insurer.” Id. (citation  
13 omitted). Importantly, on a subrogation claim, “the insured, and only the insured” may sue.  
14 Hughes, 589 F.3d at 1092. In contrast, an assignee “may, by virtue of such assignment, sue and  
15 maintain an action or actions in his or her name. . . .” RCW 4.08.080.

16 While the Stipulation and Court Order repeatedly refer to “subrogation” of claims and  
17 rights, they constitute assignments in substance. (See Dkt No. 12; Dkt. No. 2, Ex. 5 at 3, 9.)  
18 Both provide that G&O would dismiss its claims regarding the uninsured losses to permit Ohio  
19 Security to prosecute *its own* claims to recover the insured losses, and both provide that Ohio  
20 Security would be substituted for G&O as the named plaintiff. Interpreting these documents as  
21 effecting merely a subrogation—rather than an assignment—would require the Court to vitiate  
22 the operative parts of both, to reverse the dismissal of G&O, and to dismiss Ohio Security’s  
23 Amended Complaint. This is manifestly not what the parties intended. See Scott Galvanizing,  
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Inc. v. Northwest EnviroServices, Inc., 120 Wn.2d 573, 580 (1993) (“[T]he touchstone of the interpretation of contracts is the intent of the parties. . . . In Washington, the intent of the parties to a particular agreement may be discovered not only from the actual language of the agreement, but also from viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.”) (internal quotations and citations omitted).

Accordingly, the Court finds that G&O assigned its entire cause of action to Ohio Security, such that Ohio Security is the real party in interest in this case. As a result, G&O need not—and cannot—be named as a plaintiff.

## Conclusion

Having found that Ohio Security is the real party in interest, the Court concludes that there is complete diversity of citizenship such that removal was proper under 28 U.S.C. § 1332(a). The Court further concludes that Ohio Security waived any argument for remand based upon the forum defendant rule. Therefore, the Court DENIES Ohio Security's Motion for Remand.

The clerk is ordered to provide copies of this order to all counsel.

Dated September 20, 2018.

Wassup. Pellman

Marsha J. Pechman  
United States District Judge